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IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1984

ERIC S. SMITH ..... PETITIONER

versus

KENTUCKY BAR ASSOCIATION ..... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS FOR REVIEW

1. **Whether the Kentucky Supreme Court's suspension of petitioner's law license was based on a charge of which he had no prior notice thereby violating his right to due process.**
2. **Whether the Kentucky Supreme Court enlarged and retroactively applied a vague disciplinary standard thereby violating petitioner's right to due process.**

## TABLE OF CONTENTS

Page

QUESTIONS FOR REVIEW ..... i

APPLICABLE COURT RULES ..... 1-3

COUNTERSTATEMENT OF THE CASE ..... 3-5

ARGUMENT ..... 5-23

**I. The Kentucky Supreme Court's Suspension of Petitioner from the Practice of Law Was Based on the Charge of Which He had Prior Notice and an Opportunity to be Heard. The Kentucky Supreme Court Did Not Substitute a New Charge and Did Not Violate the Petitioner's Right to Procedural Due Process.** ..... 5-13

**II. The Kentucky Supreme Court Has Not Enlarged and Retroactively Applied a Vague Disciplinary Standard to Suspend Petitioner's License to Practice Law and Has Not Violated His Right to Due Process.** ..... 13-23

CONCLUSION ..... 24

## TABLE OF AUTHORITIES

CASES: Page

*Kentucky Bar Association* v. *Signer*,
558 S.W.2d 582 (Ky. 1977) . . . . . 6

*In re Edge*,
282 S.W.2d 830 (Ky. 1955) . . . . . 6

*Louisville Bar Association* v. *Hubbard*,
282 Ky. 734, 139 S.W.2d 773 (1940) . . . . . 6

*In re Gilbert*,
274 Ky. 187, 118 S.W.2d 535 (1938) . . . . . 6

*In re Stump*,
272 Ky. 593, 114 S.W.2d 1094 (1938) . . . . . 6

*Kentucky Bar Association* v. *Stivers*,
475 S.W.2d 900 (Ky. 1972) . . . . . 7

*Kentucky Bar Association* v. *Franklin*,
534 S.W.2d 459 (Ky. 1976) . . . . . 7

*Kentucky Bar Association* v. *Collis*,
535 S.W.2d 95 (Ky. 1975) cert den 423 U.S. 1049 . . . . 7

*Kentucky Bar Association* v. *Tucker*,
535 S.W.2d 97 (Ky. 1975) cert den 423 U.S. 1054 . . . . 7

*Kentucky Bar Association* v. *Cohen*,
625 S.W.2d 573 (Ky. 1981) cert den 456 U.S. 1007 . . . 7

*In re Ruffalo*,
390 U.S. 554 (1968) . . . . . passim

*Daugherty* v. *Runner*,
581 S.W.2d 12 (Ky. App. 1978) . . . . . 14, 17

*In re Ray*,
390 S.W.2d 899 (Ky. 1965) . . . . . 15-16

*Palms' Administrators* v. *Howard*,
112 S.W. 1110 (Ky. 1908) . . . . . 17

## TABLE OF AUTHORITIES (Continued)

CASES: Page

*Hunt* v. *Picklesimer*,
162 S.W.2d 27 (Ky. 1942) . . . . . 17

*Arrowood* v. *Lyon*,
279 S.W.2d 801 (Ky. 1955) . . . . . 17

*Owen* v. *Neely*,
471 S.W.2d 705 (Ky. 1971) . . . . . 17

*Kentucky Bar Association* v. *Vincent*,
537 S.W.2d 171 (Ky. 1976) . . . . . 19

*Kentucky Bar Association* v. *Kramer*,
555 S.W.2d 245 (Ky. 1977) . . . . . 20

*Kentucky Bar Association* v. *Ricketts*,
599 S.W.2d 454 (Ky. 1980) . . . . . 20

*Nicholson* v. *Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky. 1978) . . . . . 21-22

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 8 . . . . . 1, 20-21

RULES OF THE SUPREME COURT OF KENTUCKY:

SCR 3.130(1) . . . . . 2, 10, 18

SCR 3.150(1) . . . . . 2, 12-13

SCR 3.300 . . . . . 2-3, 12-13

OTHER AUTHORITIES:

*Black's Law Dictionary* (4th Edition; West, 1968)
Definition of the term "uberrima fides" . . . . . 16

## TABLE OF AUTHORITIES (Continued)

OTHER AUTHORITIES: Page

7 Am.Jur.2d *Attorneys at Law* § 120 . . . . . 17

7 Am.Jur.2d *Attorneys at Law* § 125 . . . . . 17

Code of Professional Responsibility

Ethical Consideration 5-1 . . . . . 18

Ethical Consideration 5-2 . . . . . 18

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## BRIEF FOR RESPONDENT IN OPPOSITION

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### APPLICABLE COURT RULES
### SUPREME COURT OF THE UNITED STATES
### RULE 8. DISBARMENT.

Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, such member forthwith may be suspended from practice before this Court. Such member thereupon will be afforded the opportunity to show good cause, within 40 days, why disbarment should not be effectuated. Upon his response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.

## SUPREME COURT OF KENTUCKY

### Rule 3.130 ABA Code of Professional Responsibility Recognized as Authority

(1) Except for Ethical Considerations and Disciplinary Rules in conflict with Rule 3.135, the Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standards of professional conduct required of members of the bar, and the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute.

### Rule 3.150 Proceedings Not Public; Exception

(1) Nothing connected with a disciplinary case shall be made public unless so ordered by the Court. Upon request of the Retirement and Removal Commission the director shall make available to the Commission any of its records pertinent to an investigation by the Commission.

### Rule 3.300 Rights of Respondent Against Whom a Charge Has Been Filed

The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, hearing before a Trial Commissioner. He shall have the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses: and the production of books, papers and documents or other writings except those contained in the investigative file or association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a

full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

## COUNTERSTATEMENT OF THE CASE

The case concerns a decision by the Supreme Court of Kentucky to suspend petitioner from the practice of law in the Commonwealth of Kentucky for eighteen months. The case began when one of petitioner's clients, Dr. Nath, filed a complaint with the Kentucky Bar Association (hereinafter referred to as KBA) against petitioner thereby initiating an investigation by the Inquiry Tribunal of the KBA. Petitioner was served with Nath's complaint and he filed a response.

On October 29, 1981, the Inquiry Tribunal issued a formal charge of unethical conduct against petitioner which is set forth in petitioner's appendix pages 40a - 45a. The charge contained a detailed statement of the allegations of fact concerning petitioner's involvement and participation in his client, Nath, making an unsecured loan of $30,000 to REBSCS. REBSCS was a corporation which petitioner formed and represented as a lawyer. Petitioner had a personal financial interest in REBSCS. The charge cited certain provisions of the Code of Professional Responsibility which petitioner was alleged to have violated. The charge further stated that petitioner was guilty of unethical and unprofessional conduct tending to bring the bar of Kentucky into disrepute. The essence of the charge was that petitioner had violated ethical duties he owed to Nath by engaging in conflicts of interest, neglecting legal matters entrusted to petitioner, and making false or deceptive statements to Nath.

Petitioner was served with the charge and he filed an answer. An evidentiary hearing was held before a trial commissioner which lasted two full days. At the hearing petitioner was afforded every opportunity to cross-examine the witnesses called against him. Petitioner testified at great length and introduced numerous documents and records into evidence. Petitioner was also permitted to introduce the testimony of any witnesses he wanted in order to support his version of what had occurred. The record of evidence produced at the hearing was voluminous and exhaustive. The evidence completely addressed every relevant aspect of petitioner's involvement with REBSCS, and all the facts and circumstances surrounding petitioner's participation in Nath loaning $30,000 to REBSCS.

After the hearing petitioner and respondent filed extensive briefs with the trial commissioner. The trial commisioner issued a report containing advisory findings of fact. The commissioner's report is set forth in petitioner's appendix pages 24a - 39a. The trial commissioner found petitioner guilty of many of the allegations of fact contained in the charge.

The trial commissioner's report was submitted to the Board of Governors of the KBA. The parties filed extensive briefs with the Board of Governors arguing the facts and the law. Petitioner took advantage of this opportunity to vigorously disagree with some of the trial commissioner's advisory findings of fact. After reviewing the entire record the Board of Governors adopted the trial commissioner's findings and by a vote of 11-0 found petitioner guilty of unethical conduct. The Board recommended to the Kentucky Supreme Court that petitioner be found guilty and suspended from the practice of law for eighteen months. A copy of the Board's opinion is set forth in petitioner's appendix pages 14a - 23a.

Petitioner disagreed with the Board of Governors and he exercised his right to request judicial review of the Board's decision by the Kentucky Supreme Court. The parties filed extensive briefs and on October 12, 1983, the Kentucky Supreme Court rendered an opinion adopting the decision of the Board of Governos and ordering that petitioner's law license be suspended for eighteen months. A copy of said opinion is set forth in petitioner's appendix pages 9a - 13a.

Petitioner was dissatisfied and filed a petition for rehearing and modification in the Kentucky Supreme Court. Petitioner argued in part that the Kentucky Court was in effect creating a new rule of ethics and applying it retroactively in violation of his constitutional right to due process of law. The KBA filed a response to the petition for rehearing requesting the Kentucky Court to clarify its opinion by more fully explaining the facts and the law which formed the basis for the decision to suspend petitioner from the practice of law.

On July 5, 1984, the Kentucky Court rendered a modified opinion and entered an order denying the petition for rehearing. The modified opinion of the Kentucky Court is set forth in petitioner' appendix pages 3a - 8a.

## ARGUMENT

### I. THE KENTUCKY SUPREME COURT'S SUSPENSION OF PETITIONER FROM THE PRACTICE OF LAW WAS BASED ON THE CHARGE OF WHICH HE HAD PRIOR NOTICE AND AN OPPORTUNITY TO BE HEARD. THE KENTUCKY SUPREME COURT DID NOT SUBSTITUTE A NEW CHARGE AND DID NOT VIOLATE THE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS.

The touchstone of procedural due process is that a per-

son who is accused of unlawful conduct must have fair notice of the allegations of misconduct and an opportunity to be heard. Respondent is confident that when this Court reviews the the charge, the trial commissioner's report, the opinion of the Board of Governors, and the opinion of the Kentucky Supreme Court, several important facts will be obvious. First, the petitioner had full and fair notice of the charges against him and the factual allegations of misconduct. Second, the petitioner was afforded a full and fair opportunity at every stage of the disciplinary process to introduce evidence and argue his case. He was afforded the opportunity to be heard at the investigative stage before the Inquiry Tribunal, at the evidentiary hearing before the trial commissioner, before the Board of Governors and in the Kentucky Supreme Court. Third, the opinion of the Kentucky Court was based on the charge issued by the Inquiry Tribunal and the decision of the Board of Governors.

The Supreme Court of Kentucky has held that disciplinary proceedings in Kentucky are neither criminal nor quasi-criminal. Disciplinary proceedings are civil in nature and are inquiries into what may have constituted unethical or unprofessional conduct. *Kentucky Bar Association* v. *Signer*, 558 S.W.2d 582 (Ky. 1977); *In re Edge*, 282 S.W.2d 830 (1955); *Louisville Bar Association* v. *Hubbard*, 282 Ky. 734, 139 S.W.2d 773 (1940); *In re Gilbert*, 274 Ky. 187, 118 S.W.2d 535 (1938); *In re Stump*, 272 Ky. 593, 114 S.W.2d 1094 (1938). The Supreme Court of Kentucky has reserved to itself the authority to make the final findings of fact and final conclusions of law in bar disciplinary cases. The reports and recommendations of the trial commissioner and the Board of Governors are merely advisory. *Kentucky State Bar Association* v.

*Stivers*, 475 S.W.2d 900 (Ky. 1972); *Kentucky Bar Association* v. *Franklin*, 534 S.W.2d 459 (Ky. 1976); *Kentucky Bar Association* v. *Collis*, 535 S.W.2d 95 (Ky. 1975) cert den 423 U.S. 1049; *Kentucky Bar Association* v. *Tucker*, 535 S.W.2d 97 (Ky. 1975) cert den 423 U.S. 1054; *Kentucky Bar Association* v. *Cohen*, 625 S.W.2d 573 (Ky. 1981) cert den 456 U.S. 1007.

Petitioner contends that the Kentucky Court suspended him for conduct entirely different than that alleged in the charge upon which he had been tried. Petitioner's argument is without merit. A review of the Kentucky Court's opinion shows that it was based on factual allegations contained in the charge, and based on the reports of the trial commissioner and the Board of Governors. In the modified opinion which the Kentucky Supreme Court rendered on July 5, 1984, the Kentucky Court expressly stated: "We adopt the decision of the Board of Governors." See Petitioner's Appendix page 2a.

The thrust of petitioner's argument is that the Kentucky Court found him guilty of unethical conduct based solely on his mere participation in the loan transaction. Petitioner seeks to characterize his involvement in the loan transaction as being innocuous and simply performing ministerial acts such as preparing the $30,000 check. In its modified opinion rendered on July 5, 1984, the Kentucky Supreme Court stated:

> It is in the events leading up to the loan that the Kentucky Bar Association has charged respondent with unethical and unprofessional conduct.
>
> We do not attempt to unravel all the contradictory testimony regarding what Dr. Nath testified respondent said and did in order to persuade Dr. Nath

to invest in REBSCS and what respondent testified that he said and did in denial.

It is uncontradicted that Nath Holdings was formed by respondent on February 13, 1980, and the certificate of incorporation was issued on February 13, 1980. Nath gave respondent a check for $30,200 on the same day and a bank account for the corporation was opened by respondent. Respondent was registered agent for service of process and used his office as mailing address for the corporation. Whether or not Nath Holdings was set up for the purpose of making the investment or loan, the timing leads to that inference.

When the meeting consummating the transaction took place, respondent had prepared a check on Nath Holdings made to REBSCS in the amount of $30,000 as a loan in exchange for convertible debenture with conversion within five years into an amount equal to ten percent (10%) of the total shares in REBSCS.

This check was voided at the request of Dr. Nath, and respondent prepared another check marked loan. There was no security or promissory note. Nath testified respondent told him all that would be taken care of later. Respondent denied this and testified he could not under the circumstances perform any service for REBSCS. In any event, REBSCS had a bank balance of $73.31. This money was quickly dispensed, first $10,000 to Towles to repay for expenses and later $5,500 to Towles to repay for expenses. The bank balance of REBSCS shortly was reduced to about $41.

Respondent's defense that it was not established that he represented Dr. Nath in this transaction is a non-defense.

Respondent had performed all the legal work for REBSCS and he owned a contingency interest in REBSCS. Respondent's office address was used as a mailing address for REBSCS. Respondent also represented Dr. Nath and one of his corporations

generally. We consider Nath Holdings as an extension of Dr. Nath personally.

Whether Dr. Nath knew that respondent owned an interest in REBSCS and whether Dr. Nath knew that Towles planned to reimburse himself for $10,000 in expenses after the loan are beside the point.

Respondent engaged in these activities culminating in preparing a check and, to that extent, participated in a transaction whereby one client lent money to a corporation in which respondent had a substantial interest. A lawyer simply cannot defend against a charge of unethical and unprofessional conduct in such a scenario. In placing himself in this position, respondent incurs the penalty imposed as recommended by the Kentucky Board of Bar Governors to this court. It is only for the reason that we cannot be sure from the evidence as to the actual misrepresentation that we do not impose a more severe penalty.

This situation is one of first impression in this Commonwealth and should illustrate that we are committed to the proposition that, in financial dealings with a client, a lawyer must exercise the utmost good faith and fidelity to a client and not place himself or herself in a position of participating in a transaction, such as here, so as to bring the bench and bar into disrepute. The unethical and unprofessional conduct here and the consequential loss of money by a client, Dr. Nath, is in our opinion such unethical and unprofessional conduct as to warrant the suspension of respondent. Petitioner's Appendix 4a - 8a.

The Kentucky Court essentially found that an attorney-client relationship existed between petitioner and Dr. Nath, and that petitioner violated fiduciary duties he owed to Dr. Nath. Such a decision by the Kentucky Court is consistent with the charge issued against petitioner and the opinion of the Board of Governors. Throughout the

period of time when petitioner was discussing REBSCS with Nath up to and including the date Nath invested the $30,000, petitioner was being paid by Nath a monthly retainer fee for personal legal advice and a monthly retainer fee to represent Nath Chartered. Petitioner gave legal advice to Nath about forming Nath Holdings to serve as the vehicle for making the investment in REBSCS. Petitioner incorporated Nath Holdings for Dr. Nath as his attorney and petitioner also opened the bank account for Nath Holdings for the specific purpose of enabling Dr. Nath to invest in REBSCS. The $30,000 which was used to fund Nath Holdings came from Nath Chartered and petitioner was general counsel for Nath Chartered on retainer. Petitioner wrote out the check for Nath to disburse the $30,000 from Nath Holdings to REBSCS. Petitioner's act of writing out the check for Nath's signature was only one of several significant actions that petitioner took to advise and assist Nath to accomplish the REBSCS investment.

It should be noted that the charge issued by the Inquiry Tribunal against petitioner not only alleged that he had violated certain provisions of the Code of Professional Responsibility but also alleged that petitioner had engaged in "unethical and unprofessional conduct tending to bring the bench and bar of Kentucky into disrepute." Petitioner's Appendix 44a - 45a. Rule 3.130(1) of the Kentucky Supreme Court provides in part: "the Inquiry Tribunal may cause to be tried all charges brought under this Code as well as charges for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." In its final opinion the Kentucky Supreme Court held that petitioner is guilty of unethical and unprofessional conduct. Petitioner's Appendix page 6a. The Kentucky Court's decision was based on the Inquiry

Tribunal's charge, the record of evidence, the trial commissioner's report and the opinion of the Board of Governors. The Kentucky Court did not create a new charge or "substitute" charges as claimed by petitioner.

Petitioner cites the case of *In re Ruffalo*, 390 U.S. 554 (1968), which is not applicable to the facts and circumstances in the present case. Ruffalo was a lawyer who was the subject of disciplinary charges in the State of Ohio. Ruffalo was charged with using a man named Orlando to solicit clients. A hearing was held at which Ruffalo and Orlando testified that Ruffalo only employed Orlando as an investigator. After the testimony a new, additional charge of ethical misconduct was levied against Ruffalo on the ground that he had hired Orlando to investigate Orlando's other employer, a railroad company. The Ohio Supreme Court ultimately disbarred Ruffalo based on the new charge which had been added after Ruffalo had testified. The United States Court of Appeals for the Sixth Circuit disbarred Ruffalo from practicing law before the Sixth Circuit based on his disbarment in Ohio. Ruffalo appealed to the United States Supreme Court which reversed. The United States Supreme Court held that Ruffalo had been deprived of procedural due process. This Court held that Ruffalo was entitled to fair notice of the charges against him before he testified.

In the present case it is clear that petitioner had fair notice of the charge against him prior to the evidentiary hearing and no new charges were issued against him after he had testified. The charge issued by the Inquiry Tribunal was detailed and concerned petitioner's conduct in a loan transaction between two of his clients, Nath and REBSCS. The charge expressly stated the facts and circumstances surrounding petitioner's involvement in the loan trans-

action from the incorporation of Nath Holdings to the issuance of the $30,000 check. The charge alleged that such actions by petitioner not only violated certain provisions of the Code of Professional Responsibility but also constituted unethical and unprofessional conduct tending to bring the bar into disrepute. It is obvious that petitioner's argument that he was not given fair notice of the charge is without merit and *Ruffalo, supra,* is inapplicable.

Petitioner, on pages 15 and 19 of his petition for writ of certiorari, complains that the disciplinary proceeding was conducted in secrecy and that he was somehow unfairly restricted from procuring and producing evidence in his own defense. Respondent disagrees. Rule 3.150(1) of the Kentucky Supreme Court provides in part: "Nothing connected with a disciplinary case shall be made public unless so ordered by the Court." The purpose of Rule 3.150(1) is to maintain the confidentiality of disciplinary proceedings from the media and members of the general public who are not involved in the case. Rule 3.150(1) cannot and should not be interpreted as preventing petitioner from investigating, interviewing witnesses and presenting evidence. Rule 3.150(1) must be read in conjunction with Rule 3.300 of the Kentucky Supreme Court which provides:

> The respondent against whom a charge has been filed shall have the right to be represented by counsel. If the Tribunal finds the answer to the charge raises issues of fact, hearing before a Trial Commissioner. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in

> the investigative file of the association. He shall have the right to an oral argument or to file a brief before the Trial Commissioner. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the Chairman, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

If petitioner honestly and sincerely believed that Rule 3.150(1) was unfairly restricting him from investigating and discussing the case with witnesses, all he had to do was file a motion with the Kentucky Supreme Court requesting relief. Petitioner never filed such a motion with the Kentucky Court. In fact, petitioner has not demonstrated that his access to witnesses or evidence was signficantly restricted by Rule 3.150(1). Petitioner only refers to an *amicus curiae* brief filed in the Kentucky Supreme Court. The record of evidence taken before the trial commissioner shows that petitioner did call several witnesses to testify on his behalf.

## II. THE KENTUCKY SUPREME COURT HAS NOT ENLARGED AND RETROACTIVELY APPLIED A VAGUE DISCIPLINARY STANDARD TO SUSPEND PETITIONER'S LICENSE TO PRACTICE LAW AND HAS NOT VIOLATED HIS RIGHT TO DUE PROCESS.

Petitioner argues that his right to due process was violated because at the time he became involved in the loan transaction with his client, Nath, petitioner did not have reasonable, prior notice that such actions could be considered unethical and grounds for discipline. Petitioner again argues that the Kentucky Supreme Court based its

decision to suspend his law license solely on the ground that he had merely "participated" in a loan transaction between clients.

As respondent has previously discussed in this brief, supra, the Kentucky Court decided to suspend petitioner's law license because he violated fiduciary duties owed to his client, Nath. The Kentucky Court held that in financial dealings with a client a lawyer must exercise the utmost good faith and fidelity to a client. It should not come as a surprise to petitioner or any other reasonable lawyer that the Kentucky Supreme Court would recognize and enforce such a standard of ethical conduct. Prior to petitioner engaging in his misconduct there was law readily available in Kentucky which gave him adequate notice that his actions could be deemed improper. In *Daugherty* v. *Runner*, 581 S.W.2d 12 (Ky. App. 1978), discretionary review denied by Kentucky Supreme Court June 5, 1979, the Kentucky Court of Appeals held at p. 16:

> What is the level of service demanded from members of the legal profession? The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties. The relationship is generally that of principal and agent; however, the attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal. Since the relationship of attorney-client is one fiduciary in nature, the attorney had the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest.

In the case of *In re Ray*, 390 S.W.2d 899 (Ky. 1965), the former Kentucky Court of Appeals (now Kentucky Supreme Court) suspended Ray from the practice of law for six months. In its opinion the Kentucky Court stated the following facts and conclusions of law at p. 890:

> Bibb was the owner of a piece of mortgaged real estate. He fell behind in his payments and was threatened with foreclosure. He then went to Ray seeking legal advice and assistance. It appeared that Bibb needed financial rather than legal aid. At Ray's suggestion, Bibb deeded the land to Ray, as "trustee," under an agreement that Ray would transfer it back to Bibb or to anyone Bibb named upon payment to Ray of his expenditures and his charges *for use of his credit* and for his services in saving the property from foreclosure. Subsequently the property was transferred at Bibb's request to his brother-in-law, for a price of $4,000. After the mortgage and all expenses were paid including a fee to Ray for legal services, Ray had left a sum of around $1,300, which he claimed as his own.
>
> The foregoing statement of facts consists only of facts asserted or admitted by Ray; it does not include disputed assertions by Bibb of fraudulent acts and representations by Ray.
>
> Although the Trial Committee stated in its report that the only issue to be considered was whether Ray had acted "fraudulently" in the handling of the real estate transaction, actually the committee based its recommendation of disciplinary action on a finding of a *breach of a fiduciary relationship.*
>
> By way of response in this Court, Ray asserts among other things (1) that he was denied the opportunity before the Trial Committee to show fully the motives behind the bringing of the charges against

him, and (2) that the evidence does not warrant a finding of fraud on his part. It is our opinion that neither of these matters is of any significance.

What is significant is that Bibb came to Ray owning a substantial equity in a piece of real estate, and when his dealings with Ray were completed he had nothing while Ray had $1,300. Obviously there was a breach of professional ethics in the achievement of such a result, and it is immaterial by what name the breach be called. We think also it is immaterial (except as regards the *degree* of the offense) that Ray may have done what he did with full agreement of Bibb. It is our opinion that an attorney may not properly be permitted to switch hats, from that of an officer of the court to that of a money lender, in the middle of his dealings with a client.

We are not convinced that Ray was guilty of any fraudulent conduct or that he was deliberately seeking to take undue advantage of his client's financial predicament. *It appears that his offense was attributable mainly to his failure to appreciate fully the high trust responsibilities that rest upon an attorney in a financial transaction with his client.* Under the circumstances we think a six-month suspension is adequate discipline. (Emphasis supplied).

Generally, as well as in Kentucky, a client is entitled to expect from his or her attorney not just competent technical performance, but *uberrima fides*, defined in *Black's Law Dictionary* (4th Edition; West, 1968) as:

> The most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception however slight . . . perfect good faith, concealing nothing . . . .

See also 7 Am.Jur.2d *Attorneys at Law* § 120:

> An attorney must faithfully, honestly, and consistently represent the interests and protect the rights of his client. He is bound to discharge his duties to his client with the strictest fidelity, to observe the highest and utmost good faith toward him, and to inform his client promptly of any known information important to him. An attorney may not withhold from his client information acquired in his capacity as an attorney (and) may not use the information to his own advantage . . . " (citations omitted)

Kentucky Courts have consistently held that the principal of *uberrima fides* is almost *per se* inconsistent with a lawyer's entangling his personal and financial affairs with those of his client, particularly where the entanglement involves the subject of the underlying representation. There is a flat presumption that the lawyer has overreached the client; see *Palms' Administrators* v. *Howard*, 112 S.W. 1110 (Ky. 1908); *Hunt* v. *Picklesimer*, 162 S.W.2d 27 (Ky. 1942); see also 7 Am.Jur.2d *Attorneys at Law* § 125.

There is also a concomitent duty to disclose any fact or matter gained in the course of the representation which would be material to the client, or to his interests; see *Arrowood* v. *Lyon*, 279 S.W.2d 801 (Ky. 1955). The attorney is under a specific obligation to recognize and promptly inform the client of adverse circumstances; see *Daughterty* v. *Runner, supra*, 581 S.W.2d at 17-18. A lawyer cannot escape this obligation by express disclaimers or reservations; *Owen* v. *Neely*, 471 S.W.2d 705 (Ky. 1971).

Furthermore, the Code of Professional Responsibility which has been adopted by the Kentucky Supreme Court

pursuant to Rule 3.130 contains the following Ethical Considerations:

> EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.
>
> EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

As an attorney actively practicing law in Kentucky, petitioner either knew or should have known about the above cited law. Petitioner either knew or should have known that he owed certain fiduciary duties to his client, Nath, and that if he violated his fiduciary duties, disciplinary sanctions could be imposed on him pursuant to Rule 3 of the Kentucky Supreme Court.

Petitioner argues that his due process rights have been violated because the Kentucky Supreme Court suspended him based on the standard that his actions constituted unethical and unprofessional conduct tending to bring the bar into disrepute. Petitioner claims that such a standard is ambiguous and void for vagueness because it does not give him adequate prior notice as to what types of conduct by attorneys are prohibited. As stated supra, respondent

submits that based on the law which existed in Kentucky at the time petitioner engaged in the acts of misconduct petitioner had fair and adequate prior notice that his violation of fiduciary duties owed to a client could result in the imposition of disciplinary sanctions with regard to his law license.

In *Kentucky Bar Association* v. *Vincent*, 537 S.W.2d 171 (Ky. 1976) the Kentucky Supreme Court suspended Vincent from the practice of law for six months based on his conviction for wilfully failing to file income tax returns. The Kentucky Court went on to state the following criterion for disciplining attorneys at p. 173:

> We have long extended the arm of patience and understanding to members of our legal profession when they have been subjected to disciplinary proceedings. It may be that we have defined the limits of conduct too broadly in speaking in subjective terms such as 'conviction of an offense involving moral turpitude or of being convicted of a serious misdemeanor or a felony.' In any event, the real criterion is and should be whether the attorney is guilty of such unprofessional and unethical conduct which is calculated to bring the bench and bar into disrepute. It is beyond cavil that an attorney who is convicted of an offense involving moral turpitude, or who is convicted of an intentional and serious misdemeanor, or who is convicted of a felony, is guilty of such conduct as is calculated to bring the bench and bar into disrepute. Respondent was permitted, without limitation, to fully indulge himself in the introduction of evidence to support his position in his effort to build up and make realistic his claim to extenuating circumstances. He is an officer of the court (Kentucky State Bar Association v. Taylor, Ky., 482 S.W.2d 574), and it is his

> duty—yes, even more so, it is his responsibility—to conduct his personal and professional life in a manner as to be above reproach. Is this too much to ask of any attorney? We think not. Other than one's own confidante, no person occupies such close relationship to the general public as do the members of the legal profession. It is the attorney to whom the intimacies of family relations are confided; it is the attorney who is entrusted with advising as to the management and disposition of the family estate; it is the attorney who is entrusted with the protection of our constitutional and statutory rights. Such a burden resting upon the members of the legal profession must not be taken lightly.
>
> '. . . that you will faithfully execute, to the best of your ability, the office of attorney at law . . .' are not idle words, to which all attorneys have pledged their allegiance. The conduct of even one attorney which would embarrass the legal profession will not be tolerated.

The Kentucky Supreme Court has adopted Rule 3.130(1) which provides that attorneys may be disciplined for violating the Code of Professional Responsibility and "for other unprofessional or unethical conduct tending to bring the bench and bar into disrepute." The Kentucky Supreme Court has held that this standard is not void for vagueness. *Kentucky Bar Association* v. *Kramer,* 555 S.W.2d 245 (Ky. 1977); *Kentucky Bar Association* v. *Ricketts,* 599 S.W.2d 454 (Ky. 1980).

It is interesting and informative to compare the Kentucky Court's standard of "unethical and unprofessional conduct tending to bring the bench and bar into disrepute" with the standard used by the Supreme Court of the United States. Rule 8 of the United States Supreme Court provides in part:

> Where it is shown to the Court that any member of its Bar has been disbarred or suspended from practice in any court of record, *or has engaged in conduct unbecoming a member of the Bar of this Court,* such member forthwith may be suspended from practice before this Court. (Emphasis supplied.)

The Kentucky Court's standard is no more void for vagueness than the standard adopted by the United States Supreme Court which is that a lawyer may be suspended for engaging in conduct unbecoming a member of the bar of the United States Supreme Court.

Another signficiant Kentucky case is *Nicholson* v. *Judicial Retirement and Removal Commission,* 562 S.W.2d 306 (1978). Nicholson was charged with having so ineptly handled a RCr 11.42 proceeding that he brought the judicial office into disrepute. The Kentucky Supreme Court rejected Nicholson's claim that the constitutional authorization to discipline judges "for good cause" was so vague as to violate his right to due process of law holding:

> Nicholson can not claim a lack of notice that his conduct would be subject to review by the Commission. The authority to remove members of the judiciary for good cause is not ambiguous to the members of the legal profession. Such phrases as "for cause" or "for good cause" are terms of art which possess a special meaning manifest to the profession when used in this context. These terms denote a legal cause which affects the ability and fitness of a judge to perform the duties of the office. *Napolitano* v. *Ward,* 317 F.Supp. 79 (D.C. III 1970); *Sarisohn* v. *Appellate Div., Second Dept., Supreme Court,* 265 F.Supp. 455 (D.C., N.Y. 1967).

> Such a standard is not so vague as to violate due process requirements. Although the specific acts of misconduct encompassed within the phrase are numerous ample guidelines for the determination of proper conduct may be found in the ethical standards applicable to lawyers and judges adopted by national and state bar associations and in the moral standards expected of judicial officers by the public. *Sarisohn* v. *Appellate Div., supra.* Such a standard is no more vague than that of "good behavior" used with respect to federal judges contained in Section 1 of Article 3 of the United States Constitution. *Friedman* v. *State,* 24 N.Y.2d 528, 301 N.Y.S.2d 484, 249 N.E.2d 369 (1969). *Id.* at 308-309.

In the case of *In re Ruffalo,* supra, Justices Marshall and White discussed this issue at pp. 554-555:

> A relevant inquiry in appraising a decision to disbar is whether the attorney stricken from the rolls can be deemed to have been on notice that the courts would condemn the conduct for which he was removed. The Court of Appeals for the Sixth Circuit had provided petitioner and other members of its bar with a general standard for disbarment:
>
> 'When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be forthwith suspended from practice before the court and notice of his suspension will be mailed to him, and unless he shows good cause to the contrary within 40 days thereafter, he will be further suspended or disbarred from practice before the court.' Rule 6(3), Court of Appeals for the Sixth Circuit.

> *Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment.* This class of conduct certainly includes the criminal offenses traditionally known as malum in se. *It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession.* (Emphasis supplied.)

The true test of whether a law or regulation is void for vagueness is to apply it to the specific fact situation before the Court. When the standard of "unethical and unprofessional conduct tending to bring the bench and bar into disrepute" is applied to petitioner and his violation of fiduciary duties owed to a client, it is clear that petitioner's actions are a proper subject for discipline. The Kentucky Supreme Court had every reason to expect petitioner and every other Kentucky attorney to exercise the utmost good faith and fidelity to a client when the attorney is involved in financial dealings with a client under the facts and circumstances of this particular case.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that three copies of this Brief for Respondent in Opposition were mailed to counsel for petitioner, Bert T. Combs, 2800 Citizens Plaza, Louisville, Kentucky 40202, and Ben L. Kessinger, Jr., 400 Bank of Lexington Building, 101 East Vine Street, Lexington, Kentucky, this 1st day of November, 1984.

Michael M. Hooper

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